

Carlos Solorio-Diaz v. Ashcroft, No. 03-70653

AUG 24 2004

CLIFTON, Circuit Judge, dissenting:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I agree with my colleagues that the numerical limitation barring Solorio-Diaz's second motion to reopen should have been equitably tolled because he was the victim of unscrupulous conduct by a notary purporting to be an immigration specialist. I part company with the majority, though, in its holding that the BIA abused its discretion in denying that motion.

The majority incorrectly concludes that Solorio-Diaz is entitled to reopening because he has "now presented evidence, not previously available, that, although minimal, is sufficient to state a prima facie case for relief." Even if the declarations from Solorio-Diaz's sister and from a friend of his cousin qualified as new, previously unavailable evidence, which seems doubtful, they do not make a prima facie case because they do not provide evidence that Solorio-Diaz has been present in the United States for more than ten years. In each declaration the affiant merely states that Solorio-Diaz was in the United States in 1985, a fact that the government does not contest. The declarations do not make the necessary proffer that he has resided here ever since.

Furthermore, Solorio-Diaz nowhere makes the argument that the declarations were previously unavailable. Instead, the majority makes this

argument for him, by reading an ineffective assistance of counsel argument into his petition and by concluding that the declarations were unavailable because the attorney who represented him at his initial hearing was ineffective. The decision should not turn on that ground, because the government has not been given the opportunity to address the issue. Solorio-Diaz may have had reason not to raise an ineffective assistance of counsel claim – perhaps because he could not satisfy the procedural requirements for such a claim established by the BIA in *Matter of Lozada*, 19 I.&N. Dec. 637 (BIA 1988). See *Iturribarria v. INS*, 321 F.3d 889, 900 (9th Cir. 2003).

I would deny the petition because Solorio-Diaz's second motion to reopen does not make a prima facie case supporting his eligibility for cancellation of removal. See *INS v. Wang*, 450 U.S. 139, 141 (1981).